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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 45

LANDMARK COLONY AT OYSTER BAY HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

TOWN OF OYSTER BAY, TOWN OF OYSTER BAY SOLID WASTE DISPOSAL DISTRICT, JOHN VENDITTO, as Supervisor of the Town of Oyster Bay, TOWN BOARD OF TOWN OF OYSTER BAY as Commissioners of the Town of Oyster Bay Garbage District, JAMES J. STEFANICH, Receiver of Taxes for TOWN OF OYSTER BAY,

Defendants.

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INDEX NO.:22709/08

MOTION DATE:8-31-09
SUBMIT DATE:8-26-10
SEQ. NUMBER - 001

MOTION DATE: 8-31-09
SUBMIT DATE: 8-26-09
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 7-31-09.....1
Notice of Cross Motion, dated 8-25-09.....2
Reply Affirmation, and in Opposition To Cross Motion, dated 8-3-10.....3
Certified Copy of Minutes (ex. F to Reply, Separately bound).....4
Reply Affidavit in Support of Cross Motion, and In Opposition to Motion, dated 8-18-10.....5

The motion by the plaintiff pursuant to CPLR 3212 for summary judgment declaring a certain waste disposal tax illegal as to it, and removing the plaintiff's property from the Town of Oyster Bay Solid Waste Disposal District ("Waste District"), is granted. The cross

motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

Initially, the Court notes that the three causes of action set forth in the amended complaint, in order, 1) complain of a failure to refund *ad valorem* Waste District taxes wrongly collected, 2) seek a declaration that the Waste District tax is illegal, and 3) assert that the plaintiff was excluded from the Town garbage district as a prerequisite for its existence, yet continues to pay taxes for the same. In the prayer for relief, however, "a" seeks a declaration that the tax is illegal and invalid, "b" calls for a refund, and "c" asks for a direction to the Town of Oyster Bay ("Town") that it remove plaintiff's property from the Waste District. It is clear that despite the reference to the first and third causes of action, the notice of motion is referring to the first and third prayers for relief, as they recite the request for the declaration that the tax is illegal, and that the unit owners be relieved of any future tax payment, which would require removal from the rolls of the Waste District. This sequence is confirmed by counsel's moving affirmation, at paragraph 3.

Pleadings are to be liberally construed absent prejudice to an opposing party (CPLR 3026), and because a rigid reading of the reference to "causes of action" in the notice of motion would cause the Court to address incorrectly the issues raised in plaintiff's motion, and defendants' response thereto, the Court will interpret such notice of motion as referring to the first and third prayers for relief.

The Court now turns to the merits of the present motion and cross motion. Plaintiff is a condominium complex within the Town. In 1980, the Town enacted Resolution 44-80, which had approved the site plan for the complex, but conditioned that approval on the following:

> (13) That the collection and disposition for the property garbage, ashes, rubbish, debris, or other waste matter shall be the sole responsibility of the Unit owners without any obligation on the part of the Town of Oyster Bay, and said Town shall not be requested or petitioned to provide for any such collection or disposition.

Plaintiff's unit owners were taxed for garbage collection notwithstanding this provision, and the plaintiff sued to stop the practice. Ultimately, the plaintiff prevailed. The Appellate Division, Second Department affirmed the Supreme Court's determination that there was no basis for the imposition of garbage collection taxes, because the plaintiff is precluded by the Resolution set forth above from receiving such services. *Landmark Colony at Oyster Bay Homeowners Assn., Inc. v Town of Oyster Bay,* 145 AD2d 542 (2d Dept. 1988). The Court noted that the Town never offered to provide garbage collection to the plaintiff, and it found without merit the argument that the services had been refused in view of Resolution's bar to even requesting such services. It also found without merit the Town's contention that by consenting to the provision set forth above the condominium developer had agreed to the continued imposition of the tax, and to waive collection services.

In 1986, however, the Town adopted another Resolution, 123-1986, under which an order established defendant Waste District. In that order, the Town stated that "all of the property and property owners benefitted are included within the limits of the proposed solid waste disposal district." It is undisputed that the plaintiff lies within the geographical boundaries of the Waste District established under the Resolution and order, and that its unit owners have been assessed and have been paying the Waste District tax..

On this motion the plaintiff points to the Appellate Division decision as having *res judicata* and collateral estoppel effect on the current dispute, and that Town Law § 198(9)(b) permits taxation only of "users" of refuse and garbage collection services, and that plaintiff's

unit owners and not users.

The Court finds that the plaintiff has made out its *prima facie* case by way of the submission of Resolution 44-80, and the affidavit of Stanley Speigelman, president of the plaintiff's Homeowner's Association, who states that he has been a unit owner since 1996 and has paid a waste disposal tax. He also states that to his knowledge, the plaintiff does not use garbage collection or garbage disposal services, which are provided by a private company. Therefore, under Resolution 44-80, Town Law § 198(9)(b) and the Appellate Division holding in *Landmark Colony at Oyster Bay Homeowners Assn., Inc. v Town of Oyster Bay*, *supra,* the tax is invalid.

In response, the defendants argue that this tax is not for garbage collection, pointing to separate lines in tax bills for garbage collection and the Waste District tax. Rather, it is for other functions, such as remediation of landfills, collection and recycling of recyclable materials, disposition of hazardous waste, operation of a solid waste disposal complex, and composting of organic waste such as leaves and grass clippings. They contend that the Town Resolutions referred to above are no bar to imposition of the tax, because in Resolution 44-80 the word "disposition" is followed by the words "for the property", which means that even though there is no garbage collection there may still be garbage "disposition" by the Waste District (private carriers for the plaintiff, they note, "may" bring the garbage they collect to a District facility), and so the tax may be imposed. They further argue that this earlier Resolution does not dispose of the issues here, because the Waste District came into existence afterwards, and thus the drafters of Resolution 44-80 could not have anticipated the services to be provided by the Waste District when that Resolution was adopted.

The defendants' position is untenable. First, there is no proof that the plaintiff's unit owners are utilizing any of the "disposition" services by the Town. The affidavits by Eric Swenson, Superintendent of Environmental Control for the Town, and John Hommell, a recycling supervisor, describe what the Town does with solid waste and the services offered to its residents, but they do not claim that any of the plaintiff's unit owners, or private carriers hired by the plaintiff, actually use the Waste District's services. Rather, these affiants state that even if the residents of the condominium complex are not doing so, they can use these services if they choose, and they are benefitted in any event as members of the Town population. Defendants' key arguments are akin to the one made to and rejected by the Appellate Division regarding collection services.

The prior Appellate Division decision cannot be given *res judicata* or estoppel effect because the issue here is not identical; the tax is different, the 1986 Resolution and service upon which the tax is based is different, and the parties thus have not had a full and fair opportunity to litigate the issues raised in the amended complaint and answer. *See, Beuchel v Bain,* 97 NY2d 295, 303-304 (2001); *Frankel v J.P. Morgan Chase & Co.,* 76 AD3d 664 (2d Dept. 2010).

Nevertheless, the holding and commentary of the earlier case are clear guides. As was true in 1988 when the case was decided, there is no proof that Resolution 44-80 has been rescinded or modified, and it refers both to the collection and disposition of waste as services the plaintiff's residents cannot request. The language of the Resolution was the basis of the appellate court's rejection of the Town's argument that unit owners had refused services that had been offered.

Thus, the current claim that certain "disposition" services are available does nothing to alter the language of the Resolution barring a request for such services. Even accepting as true defendants' contention that condominium residents may, on their own initiative, avail themselves of certain services, such as taking recyclables or grass clippings to a collection area, is not proof that any particular unit owner has done so. Thus, the circumstances present now regarding "disposition" of waste are not materially different from those regarding the "collection" of that waste, and upon which the Appellate Division based its determination. Accordingly, this Court finds, as did the Appellate Division in 1988, that a tax cannot be imposed on those who do not receive, and are barred from affirmatively seeking, the services from the Town upon which the tax is based, and where there is no proof that those being taxed are utilizing those services. *See also, Applebaum v Town of Oyster Bay,* 81 NY2d 733 (1992).

Further, the argument, in effect, that as members of the public plaintiff's unit owners benefit from the Waste District's services indirectly is without merit. Mr. Swenson points out in his reply affidavit that, for example, solid waste received at the Waste District's transfer station is transported off Long Island, and that the Waste District sends its personnel into public schools to educate children on the benefits of recycling. However, there is no authority offered for the proposition that such indirect benefits can support a tax such as the one at issue here, either as a matter of statute or case law.

As correctly stated by the plaintiff, taxes that are based on refuse services can be levied only on users of those services. Town Law § 198(9)(b) [renumbered as "c" by L 2009

c 409]. [1] That statute provides, in relevant part, that districts providing such services may:

> Establish from time to time, charges, fees or rates to be paid by users for refuse and garbage collection service... such charges shall be a lien upon the real property for which or in connection with which the services are rendered.

The Town Law thus permits charges to be levied only for "users." "Refuse" service is specifically mentioned in addition to "garbage collection" services, and waste disposal is undeniably a refuse service. Solid waste disposal districts are therefore covered by the statute.

Any doubt about the need to establish "use" of waste disposal services before a tax may be imposed is erased by the fact that under the statute liens exist on the real property served. The obvious intent of the statute therefore is that if one is receiving refuse services at the premises, a tax can be imposed and a lien established. The clear corollary is that if one is not receiving those services at the premises, a tax cannot be imposed and no lien is possible. It cannot seriously be argued that taking cans to a recycling center, or having one's child hear a presentation from a Waste District employee, involves a resident's real property such that a lien may be imposed under this statute. If no lien can be imposed, no tax can be imposed in the first instance, as they are inextricably linked under the law.

In view of the foregoing, the Court finds the affirmative defenses asserted in the (amended) answer to be without merit, and are not an impediment to summary judgment favor of the plaintiff. The first asserts a benefit to plaintiff by being included within the Waste District; this is discussed above. The second and third claim that an Article 78 special

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[1] The new statute added a sentence regarding charges for energy audits and energy efficiency improvements, not relevant here.

proceeding or certiorari, respectively, should have been utilized to bring this tax challenge case to the courts; however, this matter is at its core a declaratory judgment action, as was *Landmark Colony at Oyster Bay Homeowners Assn., Inc. v Town of Oyster Bay,* 145 AD2d 542, *supra*, and thus the use of an action was proper.

The fourth asserts that payment of taxes without protest constitutes a waiver of plaintiff's right to claim that it was not "benefitted" by the Waste District, but a waiver of a legal right must be knowing and intelligent before it can be enforced. *See, e.g., Juule v Board of Educ. of Hempstead School Dist. No. 1,* 76 AD2d 857 (2d Dept. 1980). The record is devoid of any proof that any unit owner understood that he or she would not be able seek declaratory relief by paying their taxes. The fifth defense also is based on waiver, but here the contention is that plaintiff failed to make a formal demand of defendants for Waste District services . This is identical to the argument made to and rejected by the Appellate Division in *Landmark Colony*, which noted that plaintiff was forbidden for asking for these services.

The sixth asserts that this present challenge should have been made at the time of the challenge to the garbage collection tax, but there is no authority presented to the effect that plaintiff had to challenge both or lose any right to challenge the Waste District tax later. As indicted above, the Court finds that *res judicata* or estoppel does not apply here, but that affects both plaintiff and defendants alike.

The seventh asserts non-joinder of a necessary party, the Nassau County Department of Assessment, because payment of refunds of the present type of *ad valorem* levies must be made by the County. However, the present motion does not seek monetary relief. The

Court declines to rule on issues that have not been placed before it by the movant, and the cross motion has not sought the addition of this party nor dismissal of the claim for a refund as alternative relief if the entire complaint were not to be dismissed.

The eighth affirmative defense is based on an alleged failure to file a prior notice of claim, but defendants' contention to the contrary notwithstanding this not a contract action, such that a notice of claim would be required. *See,* Town Law § 65(3). The ninth asserts that plaintiff refused recycling services offered by the Waste District, but this does nothing to alter the fact that plaintiff and unit owners are not "users" under Town Law § 198(9)(b).

Finally, the Court disagrees that the applicable statute of limitations has run, as claimed in the tenth affirmative defense. This hearkens back to the claim that this dispute should be litigated in the context of Article 78, which has a four-month statute of limitations. Defendants' reliance on *Press v County of Monroe* (50 NY2d 695 [1980]) is misplaced. The Court of Appeals found that the challenges made by the plaintiffs in that case were to property classifications underlying their taxes, which classifications were found to have been made not as legislative acts, but as administrative or quasi-administrative determinations that were subject to change year to year. That is not the case here, as the Resolutions at issue are of long standing and established permanent legal conditions that would have to be repealed by the Town to be undone. Under *Press,* this means that there was no requirement that the challenge be made under Article 78, and within its time limits. *Id.,* at 703-704. To the extent that defendants argue under *Press* that municipal funding depends upon the prompt disposition of these types of challenges, the Court again notes that summary judgment is not sought for monetary relief.

It is also worth noting that, according to the defendants, the prior action that resulted in the Appellate Division decision in 1988 was commenced in 1987 – years after the 1980 Resolution that led to the taxation for garbage collection ultimately overturned. Indeed, in addressing the refunds sought in that case the Appellate Division stated that the taxes at issue dated from January 1, 1982, which was five years earlier.

Accordingly, summary judgment as sought in plaintiff's motion is granted. The Court declares that the solid waste disposal tax is illegal as to plaintiff and its unit owners, and orders that plaintiff and its unit owners be removed as members of the Solid Waste Disposal District for purposes of taxation by such District. The cross motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 24, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
SEP 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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